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MAY 23 1958
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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 902.

DON O. FEAK, *et al.*,
Petitioners,

vs.

CITY OF TOLEDO, *et al.*,
Respondents.

RESPONDENTS' BRIEF

Directed to Petition for Writ of Certiorari to The Supreme Court of Ohio.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-9847

TABLE OF CONTENTS.

Jurisdiction 1

Constitutional Question 2

Statement of the Case 2

Argument 3

Conclusion 4

APPENDICES:

A. Ordinance, Article IX, Section 25-9-1 5

B. Judgment Entry of the Trial Court 7

C. Opinion of the Court of Appeals of Lucas County, Ohio 9

D. Judgment Entry of the Court of Appeals of Lucas County, Ohio 11

E. Judgment Entry of the Supreme Court of Ohio 13

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JURISDICTION.

The Supreme Court of Ohio denied the petitioners' motion to certify the record in this case for hearing on its merits. Said denial constituted a final order of the Supreme Court of Ohio and, in effect, sustained the judgment of the Court of Appeals of Ohio.

The trial court denied the petitioners' petition to exercise its equitable powers to enjoin the respondents from enforcing the legally enacted ordinance making it a crime for anyone to own, possess, exhibit, operate or permit the exhibition or operation of any coin operated amusement device of whatever kind or description, which is so constructed as to make possible either directly or indirectly by the use of an adjustment, to award anything of value, including a free play on said device. (See ordinance marked Appendix A.)

CONSTITUTIONAL QUESTION.

The constitutional question presented is whether the courts of Ohio have violated the petitioners' constitutional rights in that said courts have refused to exercise their equitable powers to enjoin the enforcement of a criminal law.

STATEMENT OF THE CASE.

For some time prior to 1936, pinball machine operators put in play, in various sections of the City of Toledo, mechanical devices known as pinball machines which were operated as gambling mechanisms. In order to control the placing and use of said machines, and to eliminate the gambling aspects thereof, the Council of the City of Toledo, on or about July 9, 1936, passed an ordinance licensing the so-called pinball machines. From time to time since the original ordinance, it became necessary, in the judgment of the City Council, to pass additional restrictive amendments thereto. On April 9, 1956, it became obvious to the Council of the City of Toledo that licensing said machines failed to control their operation and use as gambling devices. City Council, therefore, on said date repealed all licensing ordinances and passed in lieu thereof, a new ordinance which is incorporated in the municipal code of the City of Toledo as Article IX, Section 25-9-1. Said ordinance made it a misdemeanor for anyone to own, possess, exhibit, operate or permit the operation or exhibition of any manual or coin or disc operated amusement device of whatever kind or description by whatever name known or commonly referred to which is so constructed as to make possible either directly or indirectly or *by the use of an adjustment* or by the registering of odds or a score, the return, or entitle one to the return of cash, tickets, discs, tokens, free plays, certificates or other privileges, whether

said ticket, disc, token, free play, certificate or other privilege has a value or not. (See ordinance marked Appendix A.)

The petitioners brought an action in the Court of Common Pleas, Lucas County, Ohio, praying that the respondents, as agents for the enforcement of said ordinance be enjoined from enforcing said ordinance.

Upon the trial of said cause, a temporary injunction previously issued by the trial court, was set aside and the prayer for a permanent injunction was denied, the trial court finding, however, that the machines such as described in the ordinance and introduced in evidence, were not gambling devices per se and were not in violation of the City ordinance. (See Appendix B.)

Upon appeal, the Court of Appeals of Lucas County, Ohio, held that the trial court should be affirmed in its judgment refusing to enjoin the enforcement of the ordinance, and held further that the trial court was in error in its finding that the machines which were introduced in evidence by the petitioners, were not in violation of the ordinance. (See Appendices C and D.)

Upon appeal to the Supreme Court of Ohio, the said court of last resort in the State of Ohio refused to review the decision of the Court of Appeals and affirmed its decision on an application for rehearing thereof. (See Appendix E.)

ARGUMENT.

We submit that the constitutional rights of the petitioners have not been violated in that the courts of Ohio have refused to exercise their equitable powers to enjoin the enforcement of a criminal law.

CONCLUSION.

We respectfully submit that the respondents' petition for a writ of certiorari directed to the Supreme Court of Ohio, should be denied and dismissed.

Respectfully submitted,

CHARLES T. LAWTON, *Director of Law*,
BY WILLIAM D. DRISCOLL,
Assistant Director of Law,
Attorneys for Respondents.

APPENDIX A.

ORDINANCE, ARTICLE IX, SECTION 25-9-1.

ARTICLE IX.

MECHANICAL AND MANUALLY OPERATED AMUSEMENT DEVICES.

SECTION 25-9-1. Mechanical Amusement Devices.

(a) It is hereby declared prejudicial to public morals and contrary to the public welfare, and is hereby made unlawful, to own, possess, exhibit, operate or permit the operation or exhibition of any pinball machine or any manually or coin or disc operated amusement device, of whatever kind or description, or by whatever name known or commonly referred to, which is so constructed as to make possible either directly or indirectly by the use of an adjustment, or by the registering of odds or a score, the return, or entitle one to the return of cash, tickets, discs, tokens, free-plays, certificates or other privileges, whether such ticket, disc, token, free-play, certificate or other privilege has a value or not.

(b) Any pinball machine or similar device described in Section 25-9-1 is hereby declared a nuisance and shall be subject to seizure by any police officer and may be destroyed by order of the Chief of Police as in the case of gambling devices. Provided, however, that anyone who owns or possesses, but does not operate or permit the operation of such machine or device, shall have 60 days from the effective date of this ordinance, to dispose of same.

(c) Whoever owns, possesses, exhibits, operates or permits the exhibition or operation of such machine shall, upon conviction, be fined not less than $50.00 nor more than $200.00, or be imprisoned not more than six months,

or both. Provided, however, that anyone who owns or possesses, but does not operate or permit the operation of such machine or device, shall have 60 days from the effective date of this ordinance, to dispose of same. (Ord. 167-56, April 9, 1956.)

APPENDIX B.

JUDGMENT ENTRY OF THE TRIAL COURT.

This cause came on for trial of the issues joined on the amended petition and the answer thereto, and was submitted to the Court upon the evidence, the arguments and the briefs of the respective counsel.

The Court, being fully advised in the premises, finds that this action is for a declaratory judgment. The prayer for injunctive relief is merely ancillary.

The Court further finds that Ordinance No. 167-56, Section 25-9-1, Article IX, Chapter 25 of the Municipal Code of the City of Toledo, is a legal and constitutional enactment by the Council of the City of Toledo.

The Court further finds that, contrary to popular belief, the provisions of said Ordinance do not ban the exhibition and use of all pinball machines in the City of Toledo.

In the course of the trial of this case, the City Manager of the City of Toledo, and, Counsel for the City of Toledo, both admitted that it was not their contention that said Ordinance ban the exhibition and use of all pinball machines in the City of Toledo.

The Court does find, however, that said Ordinance does legally and constitutionally provide for the control and regulation of the ownership, possession and use of pinball machines, and for their seizure when used as gambling devices.

The Court further finds that the two pinball machines in evidence as Plaintiffs' Exhibits "A" and "B," are not violative of the aforesaid Ordinance, as no evidence was introduced in the trial of this case that these two machines were used as gambling devices, even to the extent of giving a free-play.

It is therefore adjudged and declared that the two pinball machines in evidence as Plaintiffs' Exhibits "A" and "B," and others exactly like them, so long as they are operated exactly as these two pinball machines were operated, are not violative of Ordinance No. 167-56, Section 25-9-1, Article IX, Chapter 25 of the Municipal Code of the City of Toledo.

It is therefore ordered that the temporary injunction heretofore ordered, be and it hereby is dissolved and held for naught, and the prayer for a permanent injunction hereby is denied.

It is further ordered that the Court costs of these proceedings in the amount of $165.20 be assessed and that they be paid one-half by the plaintiffs and one-half by the defendants. Execution is allowed to issue therefor.

To the foregoing findings, declarations and orders, plaintiffs and defendants have saved their respective exceptions and the same are allowed.

TOM D. STAHL,
Judge.

APPENDIX C.

OPINION OF THE COURT OF APPEALS OF LUCAS COUNTY, OHIO.

YOUNGER, J. This case arises on appeal by the City of Toledo from a finding and judgment of the Court of Common Pleas of Lucas County, relative to the interpretation and legal effect of Ordinance No. 167-56, Section 25-9-1, Article IX, Chapter 25 of the Municipal Code of the City of Toledo, relating to so-called pinball machines.

Stripped of words unnecessary for our consideration, the ordinance reads as follows:

> "It is hereby declared prejudicial to public morals and contrary to the public welfare and is hereby made unlawful to own * * * any pinball machine * * * which is so constructed as to make possible * * * by the use of an adjustment or by the registering of odds or a score, the return of * * * tokens, free plays, * * * or other privileges."

The Common Pleas Court held that this ordinance was a legal and constitutional enactment by the Council and legally and constitutionally provides for the control and regulation of the ownership, possession and use of pinball machines and for their seizure when used as gambling devices. The court further found that there was no evidence introduced in the trial of the case that the two machines introduced in evidence were used as gambling devices even to the extent of giving a free play and that therefore the ownership of said machines was not violative of the ordinance.

It is admitted that the machines introduced in evidence, as originally constructed did provide for free plays and that such machines are necessarily quite complicated in their construction. The evidence shows that the ma-

chines introduced in evidence were altered and rearranged so that the free play feature had been eliminated, and there was a great amount of evidence introduced as to the length of time, skill and knowledge required to change the machine back so that the free play feature would again work. It is claimed on one hand that it would take a day or so for an ordinary mechanic to change the machines from no free play to free play or to reactivate the machines. On the other hand, it is claimed an expert pinball mechanic could reactivate the machines in a matter of minutes.

However, our decision in this case cannot be controlled by the length of time necessary to reactivate the machines. The evidence introduced shows plainly that the machines in question can be reactivated, and whether an ordinary mechanic requires several days or an expert only fifteen minutes to do the trick, is beside the point. These machines do register odds or a score and can be adjusted to provide free plays or other privileges.

Since the constitutionality of the ordinance is not under attack in this Court, we are not called upon to review the recent cases on that subject. That has been well done by Judge Fess of the Sixth Appellate District, sitting by assignment in the Second District, in the *Benjamin* and *Ferguson* cases against Columbus. These cases are as yet unreported, but all counsel in the instant case are familiar with the opinion, and this Court has been furnished with a copy.

It is fundamental in cases of this nature that the court cannot substitute its judgment for that of the council which enacted this ordinance. The necessity for and wisdom of the ordinance is a matter which has been determined by the Council of the City of Toledo and an ordinance can not be overthrown by a court unless such legislation is

clearly arbitrary, unreasonable or unrelated to the public health, morals, safety or welfare of the community.

Our conclusion, therefore, is that so much of the judgment of the Court of Common Pleas as holds that the ownership of the pinball machines introduced in evidence is not violative of the ordinance will be reversed, and since the record fails to show the plaintiffs to be entitled to the relief prayed for, their petition will be dismissed and final judgment entered for the defendant city.

MIDDLETON, *P. J.* and GUERNSEY, *J.*, concur.

APPENDIX D.

JUDGMENT ENTRY OF THE COURT OF APPEALS OF LUCAS COUNTY, OHIO.

This cause came on to be heard upon the appeal by defendants below, the City of Toledo, *et al.*, from a final order of the Common Pleas Court of Lucas County, Ohio, upon questions of law and fact and on questions of law. The court finds that defendants-appellants have abandoned their appeal upon questions of law and fact and perfected their appeal on questions of law. Said appeal on questions of law and fact is hereby dismissed.

This cause is retained as an appeal upon questions of law.

The court finds that the judgment of the Court of Common Pleas of Lucas County, Ohio, held that Ordinance No. 167-56 of the City of Toledo was a legal and constitutional enactment by the Council of the City of Toledo and was in accordance with law; that the consti-

tutionality of said ordinance was not raised by the pleadings, the assignments of error nor argued in the briefs in this case in this Court, and this Court therefore does not pass upon the same.

The court further finds that the trial court was in error in declaring that said ordinance does not ban the ownership, exhibition and use of all pinball machines in the City of Toledo which are so constructed as to make possible by use of an adjustment or by registering odds or a score, the return of tokens, freeplays or other privileges. The Court finds that the two machines in evidence and others like them are violative of said ordinance.

It is therefore ORDERED, ADJUDGED and DECREED that the portion of the judgment of the Court of Common Pleas holding that the two machines in evidence are not violative of the ordinance should be and hereby is reversed.

The court, being fully advised in the premises, finds that there is no basis for the application of plaintiffs-appellees for a rehearing, and therefore it is further ORDERED, ADJUDGED and DECREED that the application for rehearing should be and it is hereby denied.

It is further ORDERED, ADJUDGED and DECREED that the petition of the plaintiffs-appellees should be and hereby is dismissed and final judgment is entered for defendants-appellants.

Costs assessed against plaintiffs-appellees and cause remanded for execution.

To all of which plaintiffs-appellees save their exceptions.

/s/ GEORGE S. MIDDLETON,
/s/ RAYMOND A. YOUNGER,
/s/ J. THOMAS GUERNSEY,
Judges.

APPENDIX E.

JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO.

(Decided December 18, 1957.)

The appeal as of right herein is dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

WEYGANDT, C. J., ZIMMERMAN, STEWART, BELL, TAFT, MATTHIAS and HERBERT, JJ., concur.